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[redacted]
Petitioners,

v.

JOSE ANTONIO FERNANDEZ-ANTONETTI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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Subject Index.

	Page
Petition	1
Opinions below	1
Jurisdiction	2
Statement of the matter involved	2
Questions presented	9
Reasons for granting the writ	10
Brief	13
Statutes and rule involved	13
Argument	13
Conclusion	27
Appendix	28
Code of Civil Procedure of Puerto Rico (1933)	28
Organic Act of Puerto Rico	28
Rule 39 (*b*) of the Court of Appeals for the First Circuit	29

Table of Authorities Cited.

CASES.

Antonetti v. Fernández García, 68 P.R.R. 447	2
Ball v. United States, 140 U.S. 118, 35 L. Ed. 377	20
Buscaglia v. District Court, 145 F. (2d) 274	16
Cain v. United States, 73 F. Supp. 1019	18
Caldwell v. Lyon, 168 Tenn. 607, 80 S.W. (2d) 80, 100 A.L.R. 1152	23
Case v. United States, 14 F. (2d) 511	21
De Castro v. Board of Commissioners of San Juan, 322 U.S. 451	10, 25, 26
Fernández v. Corte, 71 D.P.R. (Adv. Sh., Sp. Ed.) 161	1
Ferris v. Higley, 20 Wall. 375, 22 L. Ed. 383	16
Fitzsimmons v. Leon, 141 F. (2d) 886	16
Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398, 78 L. Ed. 413, 88 A.L.R. 1481	15

Page

McDowell v. United States, 159 U.S. 596, 40 L. Ed. 271 20
Mimmack v. United States, 97 U.S. 426, 24 L. Ed. 1067 18
Montgomery v. United States, 19 Ct. Cl. 375 18
Puerto Rico v. The Shell Co., 302 U.S. 253, 82 L. Ed. 235 16
Rubert Hermanos, Inc., v. People of Puerto Rico, 106 F. (2d) 754 16
Sancho Bonet v. Texas Co., 308 U.S. 463 25
Scully v. United States, 193 Fed. 185 18
Sloat v. Board of Examiners, 274 N.Y. 367, 9 N.E. (2d) 12, 112 A.L.R. 660 19
Springer v. Government of the Philippine Islands, 277 U.S. 189, 72 L. Ed. 845 16, 22
United States v. Corson, 114 U.S. 619, 29 L. Ed. 254 18
United States v. Mouat, 124 U.S. 303, 31 L. Ed. 463 18
United States v. Schlierholz, 137 Fed. 616 18
Ward, ex parte, 173 U.S. 452, 43 L. Ed. 171 20

STATUTES.

Constitution of U.S., Art. II, sec. 2 17, 24

Code of Civil Procedure of Puerto Rico (1933 ed.) sec. 21 3, 4, 5, 6, 9, 10, 11, 13, 14, 17, 22, 23, 24
28 U.S.C. sec. 1254 2
Organic Act of Puerto Rico (48 U.S.C. 812) sec. 26 5, 14, 18, 24
Organic Act of Puerto Rico (48 U.S.C. 873) sec. 49 4, 5, 9, 10, 11, 14, 16, 17, 18, 24, 26

Rules of Court of Appeals for First Circuit, Rule 39 (*b*) 1, 2, 7, 8, 9, 24

Supreme Court of the United States.

OCTOBER TERM, 1950.

HEIRS OF EUGENIO FERNANDEZ GARCIA,
Petitioners,
v.
JOSE ANTONIO FERNANDEZ-ANTONETTI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Heirs of Eugenio Fernández-García, pray that a writ of certiorari may issue to review the judgment of the Court of Appeals for the First Circuit entered summarily under Rule 39 (*b*) of that court on November 13, 1950, in the above case, docketed in said court as No. 4525. Said judgment affirms a summary judgment of the Supreme Court of Puerto Rico, entered on March 31, 1950.

Opinions Below.

The opinion of the Supreme Court of Puerto Rico is printed in the record (R. 117-141), and is reported under the title of *Fernández* v. *Corte,* 71 D.P.R. (Adv. Sheets, Sp.

Ed.) 161. The opinion of the Court of Appeals is reported in 184 F. (2d) 1015, and is printed in the record, pp. 156-160.

Jurisdiction.

Jurisdiction is invoked under Title 28, United States Code, § 1254.

Statement of the Matter Involved.

On January 23, 1947, the Tribunal for the Judicial District of San Juan, Puerto Rico, entered a judgment in favor of José Antonio Antonetti against the Heirs of Dr. Eugenio Fernández García, here petitioners, declaring Antonetti to be a recognized natural child of Dr. Fernández García. The judgment was affirmed on appeal by the Supreme Court of Puerto Rico (*Antonetti* v. *Fernández García*, 68 P.R.R. 447 (1948)) and in turn affirmed under Rule 39 (*b*) by the Court of Appeals for the First Circuit, on November 9, 1948.

On December 14, 1948, the petitioners, Heirs of Eugenio Fernández García, filed a new suit against Antonetti in the Tribunal of the Judicial District of San Juan, Puerto Rico, seeking a declaration that the earlier judgment of January 23, 1947, was void. This action was removed to the District Court for the Judicial District of Ponce. Antonetti moved for summary judgment, which the District Court of Ponce denied. Antonetti then applied to the Supreme Court of Puerto Rico for review by certiorari. The writ was granted, and the Supreme Court of Puerto Rico, concluding that there was no genuine issue as to any material fact, and that the District Court of Ponce should have granted Antonetti's petition for a summary judgment, entered its own summary judgment, dismissing the complaint.

The Heirs of Fernández García appealed to the Court of Appeals for the First Circuit, contending in substance that there were substantial federal questions involved, arising out of the following circumstances:

The judgment attacked was entered by, and the trial upon which it was based was held before, one Jesús A. González, an Assistant Attorney General of Puerto Rico, who purported to act as a judge of the Tribunal of the Judicial District of San Juan during the temporary absence of, and as substitute for, the Hon. Borinquen Marrero Ríos, one of the regular judges of that court. Mr. González claimed to be entitled to act under two designations issued by the Governor of Puerto Rico, without the concurrence of the insular Senate. The first of these, dated November 18, 1946, states that, since the regular judge has been granted a leave of fifteen days, commencing on November 18, 1946, the Governor thereby designates attorney Jesús A. González, Assistant Attorney General, substitute judge of the aforesaid court during the absence of the Hon. Borinquen Marrero Ríos or until further order. This designation was purportedly in effect during the trial of the cause. The second designation, dated January 21, 1947, claimed to be in effect when the judgment was entered, states that, since the Hon. Borinquen Marrero will be absent from the court on January 21, 1947, the Governor thereby designates Jesús A. González, Assistant Attorney General, to act as substitute judge of the Tribunal of the Judicial District of San Juan during the absence of the regular judge or "until further order."

These designations were purported to have been made under the provisions of section 21 of the Code of Civil Procedure of Puerto Rico (1933 ed.), which states that, if "the regularly appointed judge is otherwise engaged, the Governor may appoint a substitute judge to act during the time the regular judge shall be disqualified."

The District Court of Ponce had held (R. 48, 52) that the appointment of Mr. González to act as judge of the Tribunal of the Judicial District of San Juan, Puerto Rico, was in violation of the provisions of section 49 of the Organic Act of Puerto Rico (48 U.S.C. 873); and that he was not a judge *de jure* or *de facto*. The Supreme Court of Puerto Rico disagreed with this holding of the Ponce court, and held (R. 117, 131) that "§ 49 of the Organic Act does not prohibit the Legislature from providing, as it did in § 21, that the Governor, without the consent of the Senate, may appoint a substitute judge for a temporary period."

The District Court of Ponce further held (R. 52) that the failure of Mr. González to take an oath of office as judge, under either designation, before entering upon his purported duties as substitute judge was fatal, and that he had thus failed to qualify as an official of the Tribunal of the Judicial District of San Juan under the provisions of section 10 of the Organic Act of Puerto Rico (48 U.S.C. 874), requiring that "All officials . . . before entering upon the duties of their respective offices, shall take an oath to support the Constitution of the United States and the laws of Puerto Rico." The Supreme Court of Puerto Rico likewise disagreed with this holding of the District Court of Ponce, and held (R. 133 ff.) that the failure of González to take the oath of office did not prevent him from being a *de facto* judge.

Petitioners contended, both in the Supreme Court of Puerto Rico and in the Court of Appeals, that if section 21 of the Code of Civil Procedure may be interpreted to authorize the Governor of Puerto Rico, without the consent of the insular Senate, to appoint even for a temporary period a substitute judge who is not a member of the regular judiciary, then such portion of section 21, as well as the

two designations of González, are inconsistent with the provisions of sections 26 and 49 of the Organic Act (48 U.S.C. 812, 873), which, with the single exception of recess appointments, requires that "All judges . . . of courts established or that may be established in Puerto Rico, and whose appointment by the President is not provided for by law, shall be appointed by the governor, by and with the advice and consent of the Senate of Puerto Rico."

The decision of the Supreme Court of Puerto Rico falls into at least two readily distinguishable propositions. The first of these is that the Governor of Puerto Rico, in designating González to act as substitute judge, did so under the provisions of section 21 of the Code of Civil Procedure, and that the Governor, in so acting, was exercising a power properly delegated to him by the Legislature, notwithstanding the provisions of section 49 of the Organic Act. The Supreme Court of Puerto Rico, while apparently conceding that sections 26 and 49 of the Organic Act govern the appointment of judges in Puerto Rico, found an exception to their plain provisions by application of the doctrine of "emergency." As the Supreme Court says (R. 129, 130): "We cannot agree that these Sections prohibit the Legislature from making a supplementary provision for appointment by the Governor alone of substitute judges who will act for a brief period in an emergency to avoid a temporary breakdown in the administration of justice. Under these circumstances, a recess appointment is not possible because there is no vacancy in the permanent office. Such a provision is in accord with the doctrine that the law abhors vacancies because they disrupt continuity of administration of public office."

The second major proposition advanced by the Supreme Court of Puerto Rico turns in part upon the failure of González to take oath of office as judge (R. 138), and in

part answers the contention of petitioners that the defects in his appointment by the Governor under section 21 of the Code of Civil Procedure were such as to invalidate his appointment. The position of the Supreme Court of Puerto Rico was that, even though González had failed to take his oath and even though his appointment under section 21 was defective, González had all the characteristics necessary to make him a *de facto* judge.

The Court of Appeals appears to have misunderstood the intent of the Supreme Court of Puerto Rico, and to have assumed, we think incorrectly, that the Supreme Court of Puerto Rico intended to rest its decision on alternate grounds; that is, that González was either lawfully appointed under section 21 of the Code of Civil Procedure, or was a *de facto* judge. This alternative ruling is not, we submit, fairly to be inferred from the opinion of the Supreme Court of Puerto Rico. Having reached this erroneous conclusion, the Court of Appeals refused to consider and decide the federal questions presented to it, that is:

(*a*) Whether the Legislature had the power under the Organic Act to authorize the Governor of Puerto Rico to appoint, without the concurrence of the insular Senate, a temporary judge who is not a member of the regular judiciary;

(*b*) Whether it was the intent of the Congress to empower the Supreme Court of Puerto Rico to formulate a doctrine of *de facto* judges which effectively nullified the expressed intent of Congress that all judges should be appointed by the Governor with the advice and consent of the insular Senate;

(*c*) Whether it was the intent of Congress that the Supreme Court of Puerto Rico should have the power to condone, under the guise of a *de facto* doctrine, an invasion

by the executive of both the legislative and judicial branches of the Government by appointment of an Assistant Attorney General of Puerto Rico to act as a temporary judge.

The Court of Appeals has thus, by affirming on grounds other than those advanced by the Supreme Court of Puerto Rico, distorted a question of local law, and has imposed upon the Supreme Court of Puerto Rico a new and different doctrine of *de facto* officers, which the latter court would in all probability not have adopted.

Similarly, the Court of Appeals has, summarily and without full argument and examination of the legal questions involved, tacitly decided important federal questions; that is, assuming that the Supreme Court of Puerto Rico did in fact intend to formulate a doctrine of *de facto* judges at variance with the provisions of the Organic Act, was it the intention of Congress to permit such a result? Even conceding that this Court might eventually conclude that Congress intended such a result, the issues involved are not such as can fairly be decided summarily and without full argument or examination of the legal questions involved.

The Court of Appeals has, we submit, misapplied the provisions of its own Rule 39 (*b*), which provides:

> "(*b*) In appeals from the Supreme Court of Puerto Rico involving only questions of local law the appellant shall be required to show in his statement on appeal that the judgment appealed from is 'inescapably wrong' or 'patently erroneous' (*Sancho Bonet* v. *Texas Co.*, 308 U.S. 463 (1940); *De Castro* v. *Board of Commissioners*, 322 U.S. 451 (1944)). The court will entertain a motion by the appellee to affirm on the ground that it is manifest from the record and the statement on appeal that the judgment below was nei-

ther 'inescapably wrong' nor 'patently erroneous', and consequently should not be disturbed by this court. . . ."

As drafted by the Court of Appeals, Rule 39 (*b*) is limited to cases "involving only questions of local law," and, as so limited, it is in accord with the policies laid down by this Court in the cases cited in the Rule itself. It was not, we feel, the intention of this Court that the Court of Appeals should abdicate the appellate functions entrusted to it by Congress. This is in effect, we submit, what the Court of Appeals has done. Faced with a question as to whether the Supreme Court of Puerto Rico intended to formulate a doctrine of *de facto* judges which permits an Assistant Attorney General to temporarily act as a district judge, which ignores the plain provisions of the Organic Act to the effect that "all judges . . . shall be appointed by the governor, by and with the advice and consent of the Senate of Puerto Rico," and subsidiarily with the question as to whether, assuming that such was the intention of the Puerto Rican court, Congress intended that the Supreme Court of Puerto Rico should have such power, the Court of Appeals says simply:

> "But we need not examine this matter in detail, for the judicially developed doctrine of *de facto* officers, and the extent to which a judgment of a *de facto* judge may be immune from collateral attack, are questions of the local law of Puerto Rico. The Supreme Court of Puerto Rico is free to formulate a local doctrine of *de facto* officers which may not in all respects coincide with the doctrine as generally applied in the courts here on the Continent."

The Court of Appeals thus assumes the very point at issue before it, and has actually decided a question of local law as well as an important federal question.

It is submitted that this Court never intended that questions of this nature should be decided summarily under Rule 39 (*b*), or under any like procedure of the Court of Appeals of the First Circuit.

Questions Presented.

1. Whether there is any conflict between the provisions of section 21 of the Code of Civil Procedure of Puerto Rico (1933 ed.) and the provisions of section 49 of the Organic Act of Puerto Rico.

2. Whether the Court of Appeals has not in fact distorted the doctrine of *de facto* judges formulated by the Supreme Court of Puerto Rico in this case.

3. Whether, assuming that it sought to do so, the Supreme Court of Puerto Rico was empowered by Congress to formulate a doctrine of *de facto* judges effectively nullifying the expressed intent of Congress that all judges should be appointed by the Governor of Puerto Rico with the advice and consent of the Senate of Puerto Rico.

4. Whether the Supreme Court of Puerto Rico was empowered by Congress to apply a doctrine of *de facto* judges in such a fashion as to condone a violation of the principle of separation of powers, by accepting as a *de facto* judge an Assistant Attorney General of Puerto Rico.

5. Whether the Court of Appeals correctly applied the provisions of its Rule 39 (*b*).

Reasons for Granting the Writ.

I.

The Court of Appeals for the First Circuit has decided an important question of local law in such fashion as probably to distort the doctrine of *de facto* officers sought to be laid down by the Supreme Court of Puerto Rico in this very case. Under guise of affirming the judgment of the Supreme Court of Puerto Rico, the Court of Appeals has attributed to the Puerto Rican court an intention to formulate a doctrine of *de facto* officers distinct and different from that which the latter court sought to formulate. In thus distorting the local doctrine of *de facto* officers, the Court of Appeals has disobeyed the injunctions placed upon it by this Court in *De Castro* v. *Board of Commissioners of San Juan*, 322 U.S. 451 (1944).

II.

The Court of Appeals has decided important federal questions in a way probably in conflict with the applicable decisions of this Court. In substance, the Court of Appeals has tacitly held that a territorial court may formulate a doctrine of *de facto* officers effectively nullifying a positive provision of the Organic Act of Congress establishing such territorial government and courts. The decision of the Supreme Court of Puerto Rico in this case is based upon the premise that there is no conflict between section 21 of the Code of Civil Procedure (1933 ed.) under which the Governor is authorized, without the concurrence of the insular Senate, to "appoint a substitute judge to act during the time the regular judge shall be disqualified," and the provisions of section 49 of the Organic Act stating that "All judges . . . shall be appointed by the governor [of Puerto Rico], by and with the advice and consent of the Senate of Puerto Rico." In failing to consider and

squarely decide this question, the Court of Appeals has tacitly held that, even though there may be a conflict between the provisions of section 21 of the Code of Civil Procedure (1933 ed.) and the provisions of section 49 of the Organic Act, the Supreme Court of Puerto Rico is authorized to formulate a doctrine of *de facto* judges in which the provisions of section 49 of the Organic Act are ignored, and under which a judge may be characterized as *de facto* even though appointed by the Governor without the concurrence of the Senate and in defiance of the provisions of that section.

The Court of Appeals has further tacitly held that the Supreme Court of Puerto Rico may properly accept an Assistant Attorney General of Puerto Rico as a *de facto* judge even though such officer purports to retain his position as Assistant Attorney General even while acting as a judge, and even though such officer has failed to take oath of office as judge, as required by section 10 of the Organic Act.

III.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision, in that the Court of Appeals has, summarily and without argument or full examination of the legal questions involved, decided matters involving the local law of Puerto Rico, and matters involving an interpretation of the Organic Act of Puerto Rico.

Petitioners therefore respectfully submit that the requested writ should issue to the United States Court of Appeals for the First Circuit directing that court to certify and send to this Court a full and complete transcript

of the record in the case therein entitled "Heirs of Eugenio Fernández García, Appellants, v. José Antonio Fernández-Antonetti, Appellee," Docket No. 4525, to the end that the said judgment and decree of said court entered on November 13, 1950, may be reviewed by this Court, and that your petitioners may have such other relief as this Court deems appropriate.

MILTON K. ECKERT,
HERBERT S. McCONNELL,
Attorneys for the Heirs of Eugenio Fernández García, *Petitioners.*

Supreme Court of the United States.

OCTOBER TERM, 1950.

HEIRS OF EUGENIO FERNANDEZ GARCIA,
Petitioners,
v.
JOSE ANTONIO FERNANDEZ-ANTONETTI,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statutes and Rule Involved.

The statutes and rule of the Court of Appeals involved are set forth in the Appendix, *infra*, pp. 28-30.

Argument.

I. The Governor of Puerto Rico has no authority to appoint any judge without the concurrence of the Senate of Puerto Rico.

The Supreme Court of Puerto Rico has held in this case, and the Court of Appeals has tacitly agreed, that there is no conflict between the provisions of section 21 of the Code of Civil Procedure of Puerto Rico and the provisions of

sections 26 and 49 of the Organic Act of Puerto Rico. González, it is contended, was appointed a temporary or substitute judge of the Tribunal of the Judicial District of San Juan, Puerto Rico, under the following provision of section 21:

> "Provided, That if the regularly appointed judge is otherwise engaged, the Governor may appoint a substitute judge to act during the time the regular judge shall be disqualified."

With the exception of recess appointments, Congress has provided in section 49 of the Organic Act of Puerto Rico (48 U.S.C. 873) that—

> "All judges . . . of courts established or that may be established in Puerto Rico, and whose appointment by the President is not provided for by law, shall be appointed by the governor, by and with the advice and consent of the Senate of Puerto Rico."

No question of a recess appointment is raised (Opinion of the Supreme Court of Puerto Rico, R. 131, n. 4).

The bare question thus presented is whether a statute of the local Legislature purporting to authorize the Governor of Puerto Rico, without the advice and consent of the insular Senate, to appoint for a temporary period a substitute judge who is not a member of the regular judiciary can be reconciled with the plain provisions of an Act of Congress which states unequivocally that "All judges . . . shall be appointed by the governor, by and with the advice and consent of the Senate of Puerto Rico."

The mere statement of the problem should be its answer. No sound reason has been advanced by either court below to support the proposition that Congress meant less than

what it said. The Supreme Court of Puerto Rico (R. 129) states merely: "We cannot agree that these Sections prohibit the Legislature from making a supplementary provision for appointment by the Governor alone of substitute judges who will act for a brief period in an emergency to avoid a temporary breakdown in the administration of justice. Under these circumstances, a recess appointment is not possible because there is no vacancy in the permanent office. Such a provision is in accord with the doctrine that the law abhors vacancies because they disrupt continuity of administration of public office."

The doctrine of "emergency" affords no refuge. As Mr. Chief Justice Hughes said in *Home Building & Loan Association* v. *Blaisdell* (1934), 290 U.S. 398, 426, 78 L. Ed. 413, 422, 88 A.L.R. 1481, 1488:

> "While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.' *Wilson* v. *New*, 243 U.S. 332, 348 [61 L. ed. 755, 773]. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. . . . But even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are re-

spectively entitled, or permit the States to 'coin money' or to 'make anything but gold and silver coin a tender in payment of debts.' "

The power to appoint a judge without the concurrence of the Senate of Puerto Rico does not exist, and no emergency can create it. The Organic Act of Puerto Rico is analogous to a Constitution for the Island government, and no sound reason has been advanced for ignoring its plain provisions.

Springer v. *Government of the Philippine Islands*, 277 U.S. 189, 72 L. Ed. 845.
Ferris v. *Higley*, 20 Wall. 375, 22 L. Ed. 383.
Buscaglia v. *District Court*, 145 F. (2d) 274.
Fitzsimmons v. *Leon*, 141 F. (2d) 886.
Rubert Hermanos, Inc., v. *People of Puerto Rico*, 106 F. (2d) 754.

As this Court said in *Puerto Rico* v. *The Shell Co.* (1937), 302 U.S. 253, 263, 82 L. Ed. 235, 243:

"In the light of the foregoing considerations, including the sweeping character of the congressional grant of power contained in the Foraker Act and the Organic Act of 1917, the general purpose of Congress to confer power upon the government of Puerto Rico to legislate in respect of all local matters is made manifest. In this connection it is significant that the only express limitation upon the power is that, in certain of its aspects, it shall be exercised consistently with the provisions of the respective acts. See §§ 37, 57 of the Organic Act, and § 32 of the Foraker Act."

There appears to have been sound reason why Congress meant what it said when it provided in section 49 of the

Organic Act that "all judges . . . shall be appointed by the governor, by and with the advice and consent of the Senate of Puerto Rico." The Organic Act of 1917 was adopted as part of a long-range plan for extending increasing self-government to the inhabitants of Puerto Rico, culminating in the Act of July 3, 1950, authorizing Puerto Rico to adopt its own Constitution. Under the Organic Act of 1917 the Congress retained the executive, providing for the appointment of the Governor and certain members of his cabinet by the President. Congress gave up such control over the legislative branch as it formerly held, substituting, for an Executive Council appointed by the Governor and the President, a popularly elected Senate. The appointive power, formerly vested in the Governor and his Executive Council, was by this new Organic Act of 1917 shared by the Governor and the insular Senate.

Section 21 of the Code of Civil Procedure of Puerto Rico was originally enacted in 1904, when the appointive power rested, for practical purposes, in the hands of the Governor. Its retention in the Code after the approval of the Organic Act of 1917 was an anachronism.

There is a significant parallel between the provisions of section 49 of the Organic Act of Puerto Rico and the provisions of Article II, § 2, of the Constitution of the United States. The latter provides that the President "shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other public officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments."

Under these provisions of the Constitution it seems to be agreed that one who is not appointed in the manner provided is not an officer of the United States within the meaning of the Constitution.

United States v. *Mouat*, 124 U.S. 303, 31 L. Ed. 463.
United States v. *Schlierholz*, 137 Fed. 616.
Scully v. *United States*, 193 Fed. 185 (1910).
Cain v. *United States*, 73 F. Supp. 1019 (1947).

There is no indication in the cases that the President of the United States has ever attempted to appoint a judge or other officer of the United States without the concurrence of the Senate; but there is indication that he has attempted to restore to office a former officer who had resigned or been removed, and that such attempts have been unsuccessful.

Mimmack v. *United States*, 97 U.S. 426, 437, 24 L. Ed. 1067 (1878).
United States v. *Corson*, 114 U.S. 619, 29 L. Ed. 254 (1885).
Montgomery v. *United States*, 19 Ct. Cl. 375 (1884).

The power of the Governor of Puerto Rico under sections 26 and 49 of the Organic Act is not, it is submitted, any greater than that of the President under the cited article of the Constitution; and any attempt on the part of the Legislature to amplify that power is, and must be, completely ineffective.

Possibly the Supreme Court of Puerto Rico was induced to disregard the plain, unequivocal language of the Organic Act through some feeling, perhaps unconscious, that a public interest would thus be served. This is not, we sub-

mit, a sound reason. As was well stated by the New York Court of Appeals in *Sloat* v. *Board of Examiners* (1937), 274 N.Y. 367, 9 N.E. (2d) 12, 112 A.L.R. 660, 662: "Disobedience or evasion of a constitutional mandate may not be tolerated even though such disobedience might, perhaps, at least temporarily, promote in some respects the best interests of the public."

II. This is not a proper case for the application of the doctrine of *de facto* officers.

Since the *de facto* doctrine is not in itself a rule of law, or based upon, or limited by, any statutory provisions, one would hardly expect to find any high degree of consistency in the decisions purportedly based upon the doctrine. In essence, a *de facto* doctrine is nothing more than a means of stating a desired result, in an effort to do "justice" in a particular litigation. As such, its limitations are in the last analysis those imposed by the self-restraint and good sense of the courts themselves.

There are certain limitations upon which most courts agree, arising apparently from the recognition that, in an effort to do "justice" in a particular case, care must be taken not to do damage to the fundamental structure of the government itself. There is, it would seem, a balance of interests. While in a particular case it might be "just" to hold that a particular litigant is estopped to raise irregularities in the appointment of an officer of the government, nevertheless, careful courts have refrained from invoking such an estoppel where the effect would be to condone more than a mere irregularity.

In the matter of federal judges, this Court has been conscious of the public interest, and has not invoked the *de facto* doctrine in any instance in which the *de facto* federal judge did not base his claim to office upon some appoint-

ment by the President, in which, if the Constitution so required, the Senate had concurred.

In *McDowell* v. *United States* (1895), 159 U.S. 596, 40 L. Ed. 271, in which a circuit judge had designated a district judge to hold court in another district within the same circuit, it was contended that the circuit judge had exceeded his statutory authority because there was no existing judge in the district. This Court said:

> "This obviously presents a mere matter of statutory construction, for the power of Congress to provide that one District Judge may temporarily discharge the duties of that office in another district cannot be doubted. It involves no trespass upon the executive power of appointment. There is no constitutional provision restricting the authority of a District Judge to any particular territorial limits. District Courts are solely the creation of statute, and the place in which a judge thereof may exercise jurisdiction is subject absolutely to the control of Congress."

Elsewhere in the opinion (p. 601) this Court points out that "Judge Seymour was a judge of the United States District Court, having all the powers attached to such office." The inference is strong that, if Judge Seymour had not been a judge at all, that is, if he had not been a person appointed as a judge by the President, by and with the advice and consent of the Senate, a different question would have been presented and a different result reached.

To the same effect see the cases of *Ex parte Ward* (1899), 173 U.S. 452, 43 L. Ed. 171, and *Ball* v. *United States* (1891), 140 U.S. 118, 35 L. Ed. 377. In both cases there were mere irregularities or informalities, involving no genuine constitutional issue, but merely questions of statutory interpretation. In the Ward case the challenged

appointment had been made by the President, who may have been guilty of a technical departure from his statutory authority, but who was undoubtedly within his constitutional powers as to recess appointments. In the Ball case the officer whose authority was challenged was a district judge in his own right, and the problem was merely one of the statutory construction of the Act authorizing a circuit judge to designate him to sit in another district.

In contrast with these cases there is the situation in *Case* v. *United States* (C.C.A. 8, 1926), 14 F. (2d) 511, in which the petitioner, by writ of habeas corpus, made a successful attack upon the jurisdiction of one of the two judges of the Eastern District of Oklahoma. The two district judges had been unable to agree upon a division of the business of the district, with the result that the senior circuit judge divided the district into two divisions, assigning the business of each division to one of the two district judges exclusively. This order was affirmed by an Act of Congress. Petitioner was convicted in one division for an offense committed in the other. On petition for writ of habeas corpus it was held that the trial involved no mere irregularity, but was wholly without lawful authority and void.

More than a mere irregularity is involved in the present case. Not only has the Supreme Court of Puerto Rico approved a trespass by the Governor upon the power of the insular Senate to confirm all judicial appointments, but it has approved an invasion by the Executive of the Judiciary by selecting an Assistant Attorney General to act as temporary judge.

Can it be reasonably contended that Congress intended that the Supreme Court of Puerto Rico should, under guise of exercising of its power to formulate a *de facto* doctrine, condone such actions? We have found no decisions of this Court or of any subordinate federal court in which similar

liberties with the Constitution have been condoned. On the contrary, this Court has restricted its application of the *de facto* doctrine to situations involving mere irregularities, and has been quick to recognize that a violation of the Constitution is no mere irregularity.

As this Court said in *Springer* v. *Philippine Islands, supra,* at pages 201, 202:

> "It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule."

In this case the Governor, in exercising his purported power under section 21 of the Code of Civil Procedure, appointed an Assistant Attorney General to act as a temporary district judge. The Assistant Attorney General has purported to act as such without oath, and without surrender of his allegiance to the Executive branch. The Supreme Court of Puerto Rico (R. 132, n. 6) seems to feel that González temporarily laid aside his subordinate duties as Assistant Attorney General in order to perform outside the supervision of the Attorney General the different and independent functions of a judge in a separate branch of the government.

This is a fundamental misconception. There is nothing in the record to indicate that González ceased to act under the supervision of the Attorney General, that he ever laid aside his duties as Assistant Attorney General, or, more important, that he was ever able upon the bench to act with the independence which is the essential characteristic of our judiciary, and a prime reason for the principle of separation of powers.

There is even a question as to whether González ever became eligible to act as district judge. The incompatibility between the office of judge of the Tribunal of the Judicial District of San Juan and the position of Assistant Attorney General of Puerto Rico is patent. The idea of the Supreme Court of Puerto Rico that González could lay aside, like a cloak, his incompatible duties as Assistant Attorney General while he performed the duties of a judge is fundamentally unsound. The general and safer rule is that one who accepts an incompatible office vacates his former office.

> *Caldwell* v. *Lyon,* 168 Tenn. 607, 80 S.W. (2d) 80, 100 A.L.R. 1152.

In the case of González the reverse would seem to be true. González did not, it would seem, cease to be an Assistant Attorney General when he accepted a temporary designation as district judge; and by that very fact it would appear that he never became a district judge at all.

The issues involved in this case are fundamental and grave. If the Supreme Court of Puerto Rico has correctly stated that under section 21 of the Code of Civil Procedure the Governor of Puerto Rico may, without the consent of the Senate, appoint a substitute judge for a temporary period, and if, as that court tacitly implies, the Governor may appoint a member of his own executive branch, then a most extraordinary power has been conferred upon the

Governor. Congress, it is submitted, could hardly have anticipated such a result, much less have intended that it should occur.

The proviso in section 21 of the Code of Civil Procedure upon which the Supreme Court of Puerto Rico relies contains in itself no limitations, and there would seem to be no reason why the Governor could not use his supposed powers to appoint the Attorney General himself as temporary judge, or to appoint some other person even closer to him in the executive branch of the government.

The risks inherent in conferring such powers upon any chief executive are manifestly grave. They are the same risks which the Constitution seeks to guard against in Article II, § 2, and which the Congress sought to guard against in sections 26 and 49 of the Organic Act of Puerto Rico.

What the Supreme Court of Puerto Rico and the Court of Appeals failed squarely to face in this case is that the *de facto* doctrine can safely and properly be applied only when objection is made to an officer on the ground of a mere informality or irregularity. It should never be applied where the objections raise fundamental, constitutional questions of the invasion by the executive of the powers and functions of both the legislative and judiciary. So applied, the doctrine sacrifices public interest, to the result of a particular lawsuit.

III. The Court of Appeals for the First Circuit misapplied the provisions of Rule 39 (*b*).

Rule 39 (*b*) of the Court of Appeals for the First Circuit provides that "In appeals from the Supreme Court of Puerto Rico involving only questions of local law the appellant shall be required to show in his statement on appeal that the judgment appealed from is 'inescapably

wrong' or 'patently erroneous' (*Sancho Bonet* v. *Texas Co.*, 308 U.S. 463 (1940); *De Castro* v. *Board of Commissioners*, 322 U.S. 451 (1944)). The court will entertain a motion by the appellee to affirm on the ground that it is manifest from the record and the statement on appeal that the judgment below was neither 'inescapably wrong' nor 'patently erroneous', and consequently should not be disturbed by this court. . . ."

Since this Court has indicated in the cases cited in the Rule that decisions of the Supreme Court of Puerto Rico involving only questions of local law are not to be disturbed unless "inescapably wrong" or "patently erroneous," the Rule when properly applied has a salutary effect, and will ordinarily save litigants the expense and delay of the printing of records and briefs and of a hearing in cases involving only questions of local law. It was not, we submit, the intention of this Court that the policy laid down in the cases cited should be used to brush aside a federal question.

Even accepting as correct the interpretation given by the Court of Appeals to the judgment of the Supreme Court of Puerto Rico, the former court has tacitly decided an important federal question in the following language (R. 159):

> "In reaching its conclusion that González was at least a *de facto* judge whose judgment in the filiation suit was not utterly void and subject to collateral attack, *the Supreme Court of Puerto Rico did not, so far as we can see, apply any unorthodox criteria.* But we need not examine this matter in detail, for the judicially developed doctrine of *de facto* officers, and the extent to which a judgment of a *de facto* judge may be immune from collateral attack, are questions of the local law of Puerto Rico. The Supreme Court of

> Puerto Rico is free to formulate a local doctrine of *de facto* officers which may not in all respects coincide with the doctrine as generally applied in the courts here on the Continent." (Italics supplied.)

As we have argued above, the federal question which the Court of Appeals ignored is whether Congress intended that the Supreme Court of Puerto Rico should formulate a doctrine of *de facto* judges under which (*a*) the Governor of Puerto Rico is allowed to appoint a judge without the advice and consent of the Senate of Puerto Rico, in obvious defiance of the provisions of section 49 of the Organic Act, and under which (*b*) the Governor has been permitted to select an Assistant Attorney General to act as judge.

As this Court took pains to point out in *De Castro* v. *Board of Commissioners, supra* (p. 458), it was not the intention that the Court of Appeals should abdicate its appellate functions even in matters of local law. "On the contrary," as this Court said, "we think that it imposes on the Court of Appeals and on this Court the peculiarly delicate task of examining and appraising the local law in its setting, with the sympathetic disposition to safeguard in matters of local concern the adaptability of the law to local practices and needs. *It is one which ordinarily cannot be performed summarily or without full argument and examination of the legal questions involved.*" (Italics supplied.)

A fortiori, it would seem to follow that, if the very question involved is as to whether there is involved a federal question or not, the Court of Appeals would hardly be justified in performing its functions summarily or without full argument and examination of the legal questions involved.

Conclusion.

Wherefore petitioners respectfully submit that a writ of certiorari in this case should be granted.

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Appendix.

Code of Civil Procedure of Puerto Rico (1933):

"Section 21. A district judge may hold court in any district in Puerto Rico upon the request of the judge of the district in which such court is to be held; and when, by reason of sickness or absence from the Island, or from any other cause, a court cannot be held in any district by the judge thereof, a certificate of that fact must be transmitted by the secretary to the Governor, who may thereupon direct some other district judge to hold such court; Provided, That if the regularly appointed judge is otherwise engaged, the Governor may appoint a substitute judge to act during the time the regular judge shall be disqualified; Provided, further, That the Governor, on recommendation of the Attorney General, may, if the public service so requires direct that one or more of the district judges of one or more district courts be temporarily transferred to any district court in the Island where the public service so requires; And, provided, further, That the transfer of a judge from one court to another, in accordance with the foregoing provisions, shall never exceed thirty (30) days."

Organic Act of Puerto Rico:

"Section 10. That all judicial process shall run in the name of 'United States of America, ss, the President of the United States,' and all penal or criminal prosecutions in the local courts shall be conducted in the name and by the authority of 'The People of Porto Rico'; and all officials shall be citizens of the United States, and, before entering upon the duties of their respective offices, shall take an oath to support the Constitution of the United States, and the laws of Porto Rico."

"Section 26. That the Senate of Porto Rico shall consist of nineteen members elected for terms of four years by the qualified electors of Porto Rico. Each of the seven senatorial districts defined as hereinafter provided shall have the right to elect two Senators, and in addition thereto there shall be elected five Senators at Large. No person shall be a member of the Senate of Porto Rico who is not over thirty years of age, and who is not able to read and write either the Spanish or English language, and who has not been a resident of Porto Rico for at least two consecutive years, and, except in the case of Senators at Large, an actual resident of the senatorial district from which chosen for a period of at least one year prior to his election. Except as herein otherwise provided, the Senate of Porto Rico shall exercise all of the purely legislative powers and functions heretofore exercised by the Executive Council, including confirmation of appointments; but appointments made while the Senate is not in session shall be effective either until disapproved or until the next adjournment of the Senate for the session. In electing the five Senators at Large each elector shall be permitted to vote for but one candidate, and the five candidates receiving the largest number of votes shall be declared elected."

"Section 49. That hereafter all judges, marshals, and secretaries of courts now established or that may hereafter be established in Porto Rico, and whose appointment by the President is not provided for by law, shall be appointed by the Governor, by and with the advice and consent of the Senate of Porto Rico."

Rule 39 (*b*) of the Court of Appeals for the First Circuit:

(*b*) In appeals from the Supreme Court of Puerto Rico involving only questions of local law the appellant shall be required to show in his statement on appeal that the judg-

ment appealed from is "inescapably wrong" or "patently erroneous" (*Sancho Bonet* v. *Texas Co.*, 308 U.S. 463 (1940); *De Castro* v. *Board of Commissioners*, 322 U.S. 451 (1944)). The court will entertain a motion by the appellee to affirm on the ground that it is manifest from the record and the statement on appeal that the judgment below was neither "inescapably wrong" nor "patently erroneous", and consequently should not be disturbed by this court. Such motion, which may be united in the alternative with a motion to dismiss the appeal, may be filed within twenty days after the filing and serving of the statement on appeal. A brief in support thereof may be filed with the motion. Five copies of such motion and brief, if any, shall be required for filing with proof of service of one copy thereof upon opposing counsel. The court may, however, upon its own motion, dismiss the appeal or affirm the judgment appealed from where the law and justice of the case so require; or, if the case is of such character as not to justify extended argument, the court may order the cause set down for immediate hearing.

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MAR 17 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 546

HEIRS OF EUGENIO FERNANDEZ-GARCIA,
Petitioners,

v.

JOSE ANTONIO FERNANDEZ-ANTONETTI,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Point I	3
Point II	9
Point III	10
Opposition on Further Ground that Judgment in Filiation Suit is Being Complied With	11
Conclusion	13
Notice to Petitioners	

Appendix

Exhibit 1: Petition for Support	14
Exhibit 2: Stipulation as to Support	15
Exhibit 3: Order Approving Stipulation	16
Exhibit 4: Support Pension Check for February	18

Cases Cited

A

A. J. Tristani, Sucrs. v. *Buscaglia,* 166 F. 2d 966 (1948) (*Cert. den.* 335 U. S. 821)	11
Albright v. *Sandoval,* 216 U. S. 331, 339	10
American Book Co. v. *Kansas,* 193 U. S. 49, 51	13
Anderson v. *Mercado,* 163 F. 2d 303 (1947) (*Cert. den.* 332 U. S. 837)	11
Antonetti v. *Fernández,* 68 P.R.R. 477	1
Armijo v. *Armijo,* 181 U. S. 558, 560-561	10

B

Ballester-Ripoll v. *Court of Appeals of P.R.,* 142 F. 2d 11 (1944) (*Cert. den.* 323 U. S. 723)	11
Buscaglia v. *Ballester,* 162 F. 2d 805 (1947) (*Cert. den.* 332 U. S. 816)	11
Buscaglia v. *District Court of San Juan,* 145 F. 2d 274 (1944) (*Cert. den.* 323 U. S. 793)	11

C

Page

Clason v. *Matko*, 223 U. S. 646, 653 10
Copper Queen Consol. Min. Co. v. *Territorial Board of Equalization*, 206 U. S. 474, 479 10
Cordova v. *Folgueras*, 227 U. S. 375, 378-379 10
Costanzo v. *Tillinghast*, 287 U. S. 341, 77 L. ed. 350 .. 5
Culp v. *Sandoval*, L.R.A. 1917-A, 1157, 22 N. M. 71, 159 Pac. 956 ..... 12, 13

D

De Castro v. *Board of Commissioners*, 322 U. S. 451 (1944) 10
Díaz v. *González*, 261 U. S. 102, 105-106 11

E

English v. *Arizona*, 214 U. S. 359, 361 10

F

Fernández v. *Ayllon*, 266 U. S. 144, 146 11
Fernández v. *Corte*, 71 D.P.R. 161 (1950) .....
Fernández Heirs v. *Fernández*, 184 F. 2d 1015 (1950) .....
Fox v. *Haarstick*, 156 U. S. 674, 679 10

G

Gray v. *Taylor*, 227 U. S. 51, 57 10

H

Harrison v. *Northern Trust Co.*, 317 U. S. 476, 87 L. ed. 407 6

I

In re Manning, 139 U. S. 504 9
Inter-Island Co. v. *Hawaii*, 305 U. S. 306, 311 11

K

Ker & Co. v. *Couden*, 223 U. S. 268, 279 10

L

Page
Lewers & Cooke v. *Atcherly*, 222 U. S. 285, 294 10
Lewis v. *Harrea*, 208 U. S. 309, 314 10

M

Matos v. *Alonso Hermanos*, 300 U. S. 429, 432 11
Mercado v. *Commins*, 322 U. S. 465 11
Mercado Riera v. *Mercado Riera*, 167 F. 2d 207 (1948) (*Cert. den.* 335 U. S. 825) 11
Monagas v. *Vidal*, 170 F. 2d 99 (1948) (*Cert. den.* 335 U. S. 911, 69 S. Ct. 483) 11

N

Nadal v. *May*, 233 U. S. 447, 454 11
Northern Pacific R. R. Co. v. *Hambly*, 154 U. S. 349, 361 10

O

Oneale v. *Thornton*, 10 U. S. 53, 6 Cranch 53, 3 L. ed. 150 5

P

Padrón v. *People of Puerto Rico*, 142 F. 2d 508 (1944) (*Cert. den.* 323 U. S. 791) 11
People of Puerto Rico v. *Rubert Hermanos, Inc.*, 315 U. S. 637, 646 11
Phoenix R. R. Co. v. *Landis*, 231 U. S. 578, 579-580 10
Pollard v. *Bailey*, 87 U. S. 520, 20 Wall. 520, 22 L. ed. 376 5

R

Rubert Hermanos v. *People of Puerto Rico*, 309 U. S. 343 10
Rullán v. *Buscaglia*, 168 F. 2d 401 (1948) (*Cert. den.* 335 U. S. 857) 11

S

Page

Sancho Bonet, Treas. v. *Texas Co.*, 308 U. S. 463, 470-472 11
Sancho Bonet, Treas. v. *Yabucoa Sugar Co.*, 306 U. S. 505, 509-511 .....
Santa Fe C. R. Co. v. *Friday*, 232 U. S. 694, 700 11
Santa Fe County v. *New Mexico*, 215 U. S. 296, 305 .. 10
Sociedad Española de Auxilio, etc. v. *Buscaglia*, 164 F. 2d 745, (1947) (*Cert. den.* 333 U. S. 867) 11
Sweene v. *Lomme*, 22 Wall. 208, 213 10

T

Treat v. *Grand Canyon R. R. Co.*, 222 U. S. 448, 452 .. 10

U

United States v. *American Trucking Association*, 310 U. S. 534, 543, 84 L. ed. 1345 6
United States v. *Boisdore Heirs*, 49 U. S. (8 How.) 113 12 L. ed. 1009 5
United States v. *Iriarte*, 166 F. 2d 800 (1948) (*Cert. den.* 335 U. S. 816) 11

V

Villanueva v. *Villanueva*, 239 U. S. 293, 298-299 11

W

Waialua Co. v. *Christian*, 305 U. S. 91, 109 11

CONSTITUTION OF THE UNITED STATES

Art. 2, par. 2 7

ORGANIC ACT OF PUERTO RICO
(Jones Act)
(39 Stat. 951, c. 145)
48 USCA, Chapter 4
—Puerto Rico—
Secs. 731-893

Section 26 4
Section 40 4
Section 49 4

UNITED STATES CODE

Page

Title 28, sec. 1254 2

UNITED STATES CODES ANNOTATED

Title 48, sec. 812 .....
Title 48, sec. 861 .....
Title 48, sec. 873 .....

CODE OF CIVIL PROCEDURE OF PUERTO RICO

Section 21 ..... 3, 4
Section 583 12

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Rule 39 10

AUTHORS CITED

Constantineau

—On the De Facto Doctrine—
pages 3-5, secs. 1-3 9

TEXTS CITED

AMERICAN JURISPRUDENCE

Vol. 43, pp. 223, 224, 226, secs. 470-471, 481 8

AMERICAN LAW INSTITUTE

Restatement, Judgments, page 41, sec. 7 9

SOUTHERN CALIFORNIA LAW REVIEW

Vol. 9, pp. 189, 217 9

YALE LAW JOURNAL

Vol. 59, page 345 9